U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 26Apr2002

Case No: 2001-STA-0022
2001-STA-0029

In the Matter of

JERRY L. MONDE
Complainant

v.

ROADWAY EXPRESS, INC.
Respondent

Appearances:

Paul Taylor, Esq.
TRUCKERS JUSTICE CENTER
Eagan, Minnesota
For the Complainant

Robert J. Hollingsworth, Esq.
CORS & BASSETT, LLC
Cincinnati, Ohio
For the Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the Surface Transportation Assistance Act of 1982 (hereinafter the Act), as amended, 49 U.S.C. Section 31105 and the Regulations found at 29 C.F.R. Part 1978. Section 31105 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

Complainant Jerry L. Monde (hereinafter Monde) filed a complaint with the Secretary of Labor, Occupational Safety and

Health Administration (hereinafter OSHA) on July 17, 2000, alleging that Respondent, Roadway Express, Inc., (hereinafter Roadway) discriminated against him in violation of Section 405 of the Act. Following an investigation, the Secretary of Labor served its Findings and Order on January 10, 2001, denying relief. On January 20, 2001, Complainant appealed that finding to this office.

On October 13, 2000, Complainant filed a second complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of Section 405 of the Act. Following an investigation, the Secretary served a Findings and Order on February 26, 2001, denying relief, which the Complainant appealed to this office on March 6, 2001. By my Order of June 15, 2001, these cases were consolidated for hearing.

A formal hearing was commenced on November 13, 2001, in Indianapolis, Indiana, where the parties were afforded full opportunity to present evidence[1] and argument. The Findings of Fact and Conclusions of Law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes and case law. Each exhibit received into evidence has been carefully reviewed. My Pre-hearing Order provided for a Stipulation of Facts to be completed by the parties which has been received into evidence as JX 06.

ISSUES

1. Whether Roadway Express, Inc., violated Section 405 of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105, by discharging, disciplining, or in some manner discriminating against Complainant Jerry L. Monde for having engaged in protected activity;

2. Whether Jerry L. Monde engaged in protected activity when he:

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[1] In this decision, "JX" refers to Joint Exhibits, "ALJX" refers to the Administrative Law Judge Exhibits, "CX" refers to Complainant Exhibits, "RX" refers to Respondent Exhibits and "Tr." to the Transcript of the hearing.

A) Logged paid layover time as on-duty, not-driving time;
B) Performed tire checks on non-placarded[2] loads; or
C) Exceeded the maximum allowed running times.

3. Whether Roadway's articulated reasons for adverse employment actions against Jerry L. Monde were pretextual;

4. Whether Jerry L. Monde is entitled to reinstatement, money damages including back pay, attorney fees, and costs; and

5. Whether reinstatement is available as a remedy where Jerry L. Monde was ultimately discharged because he failed to follow the terms of the collective bargaining agreement relating to the grievance procedures.

STIPULATION OF FACTS

1. Complainant Jerry L. Monde was an employee of Respondent Roadway Express, Inc., as defined in 49 U.S.C. § 31101(2), from July 4, 1999, to August 13, 2000.

2. Respondent is engaged in interstate trucking operations and is an employer subject to the Surface Transportation Assistance Act, 49 U.S.C. § 31105.

3. Respondent employed Complainant to operate commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more in interstate commerce.

4. On or about July 17, 2000, Complainant timely filed a complaint with the Secretary of Labor

[2] Title 49 Part 172 of the Code of Federal Regulations permits transportation of certain hazardous materials, provided the transporting vehicle is marked with signs, or placards, indicating the presence of materials. Vehicles containing amounts of hazardous materials less than those prescribed in the regulations do not require placards.

alleging that Respondent had discriminated against him and discharged him in violation of the employee protection provisions of the Surface Transportation Assistance Act. The OSHA case number assigned for this complaint is 280982.

5. Following an investigation the Secretary of Labor served her Findings and Order in case number 280982 on January 10, 2001. On January 20, 2001, Complainant filed timely objections to the Secretary's Findings and Order.

6. On or about October 13, 2000, Complainant timely filed a second complaint with the Secretary of Labor alleging that Respondent had discriminated against him and discharged him in violation of the employee protection provisions of the Surface Transportation Assistance Act. The OSHA case number assigned for this complaint is 281006.

7. On or about February 26, 2001, the Secretary of Labor issued her Findings and Order in case number 281006. On March 6, 2001, Complainant filed timely objections to the Secretary's Findings and Order.

8. The United States Department of Labor, Office of Administrative Law Judges has jurisdiction over the subject matter of this proceeding and the parties.

9. "Running time" is defined by Roadway Express, Inc., as the maximum allowable drive time plus pre-trip inspection and allowable breaks. It is measured from the time the driver punches his paycard at the origin terminal and extends to the time that he punches his paycard at the destination terminal.

10. The distance from Respondent's terminal in Rock Island, Illinois, to Respondent's terminal in Indianapolis, Indiana is 312 miles.

11. The distance from Respondent's terminal in Indianapolis, Indiana, to Respondent's terminal in St. Louis, Missouri is 262 miles.

12. The distance from Respondent's terminal in St. Louis, Missouri, to Respondent's terminal in Springfield, Missouri is 192 miles.

13. The distance from Respondent's terminal in Kansas City, Kansas, to Respondent's terminal in Indianapolis, Indiana is 491 miles.

14. The distance from Respondent's terminal in Springfield, Missouri, to Respondent's terminal in St. Louis, Missouri, to its terminal in Rock Island, Illinois is 447 miles.

15. The distance from Respondent's terminal in Indianapolis, Indiana, to Respondent's terminal in Springfield, Missouri, is 444 miles.

16. The maximum posted speed limit for commercial motor vehicles for all relevant times was fifty-five miles per hour in Illinois, sixty miles per hour in Indiana, sixty-five miles per hour in Missouri, and sixty-five miles per hour in Kansas.

17. At all relevant times, Respondent's specified running time from its terminal in Rock Island, Illinois to its terminal in Indianapolis, Indiana was 7.4 hours unless the driver was transporting hazardous materials. This time consisted of 6.3 hours drive time, 0.1 hours pre-trip inspection, and 1.0 hour break.

18. At all relevant times, Respondent's specified running time from its terminal in Indianapolis, Indiana, to its terminal in St. Louis, Missouri, to its terminal in Springfield, Missouri, was 10.9 hours unless the driver was transporting hazardous materials. This time consisted of 9.3 hours drive time, 0.1 hours pre-trip inspection, and 1.5 hours break time.

19. At all relevant times, Respondent's specified running time from its terminal in Kansas City, Kansas, to its terminal in Indianapolis, Indiana, was 11.7 hours unless the driver was transporting hazardous materials. This time consisted of 9.6 hours drive time, 0.1 hours pre-trip inspection, and 2.0 hours break time.

20. At all relevant times, Respondent's specified running time from its terminal in Springfield, Missouri to its terminal in St. Louis, Missouri, to its terminal in Rock Island, Illinois, was 10.7 hours unless the driver was transporting hazardous materials. This time consisted of 9.0 hours drive time, 0.1 hours pre-trip inspection, and 1.6 hour break.

21. At all relevant times, Respondent's specified running time from its terminal in Indianapolis, Indiana, to its terminal in Springfield, Missouri was 10.9 hours unless the driver was transporting hazardous materials. This time consisted of 9.3 hours drive time, 0.1 hours pre-trip inspection, and 1.5 hour break.

22. On March 18, 2000, Complainant transported trailers from Rock Island to Indianapolis. One of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823 but did not require placarding.

23. On March 19-20, 2000, Complainant transported trailers from Indianapolis to St. Louis, and then to Springfield, Missouri. During each leg of the trip, one of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823 but did not require placarding.

24. On April 1, 2000, Complainant transported trailers from Indianapolis, to Springfield, Missouri. One of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823 but did not require placarding.

25. On April 12-13, 2000, Complainant transported trailers from Indianapolis to Kansas City,

Kansas. One of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823 but did not require placarding.

26. On July 14, 2000, Complainant transported trailers from Indianapolis to St. Louis. The two trailers contained hazardous materials as defined by 49 C.F.R. §177.823 but did not require placarding.

27. On July 15, 2000, Complainant transported trailers from St. Louis, to Springfield, Missouri. Neither of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823.

28. On July 15-16, 2000, Complainant transported trailers from Springfield, Missouri, to Indianapolis. One of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823 but did not require placarding.

29. On July 23, 2000, Complainant transported trailers from Kansas City, Kansas to Indianapolis. One of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823 but did not require placarding.

30. On July 26-27, 2000, Complainant transported trailers from Indianapolis to Kansas City, and then from Kansas City, Kansas to Indianapolis. During each leg of the trip, one or more of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823 but did not require placarding.

31. On July 29-30, 2000, Complainant transported trailers from Springfield, Missouri, to St. Louis, Missouri, to Rock Island, Illinois. During each leg of the trip, one or more of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823, but only one trailer, from St. Louis to Rock Island, required placarding.

32. On August 5-6, 2000, Complainant transported trailers from Indianapolis, Indiana, to Springfield, Missouri. Both of the trailers contained hazardous materials as defined by 49 C.F.R. §177.823, but only one trailer required placarding.

FINDINGS OF FACT

Roadway hired Monde on July 4, 1999, as an over-the-road truck driver at its Indianapolis, Indiana facility. (JX 06, Tr. 53) Monde received his first discipline, a warning letter, from Respondent on March 24, 2000, following an incident on March 17, 2000, where Complainant did not complete a trip from Springfield, Missouri, to Rock Island, Illinois. (RX 01) Monde notified the dispatcher for Roadway that he had exhausted the number of hours which he was permitted to drive pursuant to Department of Transportation (hereinafter DOT) regulations. (Tr. 274-276, 668) Monde, however, acknowledged that he was not out of hours on this date and that, under instruction of a supervisor, he drove the truck the remainder of the way to Rock Island, Illinois. (Tr. 275) Ron Baysinger was the relay manager for Roadway. He had twenty-four years experience with Roadway and nine years experience as the relay manager for the Indianapolis terminal. (Tr. 648) As part of his job, Mr. Baysinger investigated Monde's hours of on-duty time, while considering his low level of seniority with such a high number of duty hours. (Tr. 668-669) This investigation ultimately led to five other disciplinary actions. (RX 2-5) Monde filed a grievance for the March 17, 2000 incident, which was later withdrawn by the Teamsters Union, Local 135 (hereinafter the Union). (RX 01, 25, Tr. 564) As a result of the investigation into this discipline, however, other log violations were revealed, which began a series of disciplinary actions and grievance proceedings.

The Official Indiana Rules and Regulations govern the progressive discipline warranted for various behavioral deficiencies. (JX 02) After a driver is disciplined, he is permitted to grieve the discipline. The "Local and Area Grievance Machinery" is described in Article Seven of the National Master Freight Agreement and Article Forty-Five of the Central Region Supplement. (JX 01) Pursuant to the agreements, following the issuance of discipline, an employee has ten days in which to file a grievance. (JX 02) After a grievance is filed, the parties attend a company level meeting to seek a

resolution. (Tr. 565) Article 45 of the Central Region Supplement provides that if the parties fail to resolve the grievance at the company level, the grievance moves to the Joint City Road Committee. (JX 01, pg. 92) If the Joint City Road Committee resolves the conflict, the resolution is final and binding on both parties. If a decision is not reached, and the committee is unable to agree on a resolution, the grievance moves to the Joint State Committee. If the Joint State Committee resolves the conflict, the resolution is final and binding on both parties. If a decision is not reached, and the committee is unable to agree on a resolution, the grievance then moves to the Joint Area Committee. If the Joint Area Committee fails to resolve a grievance, it can be heard by the National Grievance Committee or the Regional Arbitration Panel.

Monde was issued a warning letter on March 24, 2000 for log falsification on March 18, 2000. (RX 02, Tr. 113-116) Monde grieved this discipline and, at the hearing, Roadway took the position that Monde was erroneously logging commute times and tire checks. (RX 02) Monde testified that since he was required to sit in his hotel room awaiting a call, he considered himself to be on-duty waiting for the call. (Tr. 117) He admitted that he was free to leave a forwarding number to take a call elsewhere, or to get a cell phone or pager to take a call anywhere away from the hotel. (Tr. 117, 252, 254) This grievance was ultimately withdrawn by the Union. (RX 25)

Complainant was issued another warning letter on March 24, 2000, for failing to make his running time on a trip from Rock Island, Illinois, to Indianapolis, Indiana. (RX 03) Monde testified that he failed to make his run time because he performed a pre-trip inspection and tire inspections en route. (Tr. 122) After grieving this discipline, the grievance was ultimately withdrawn by the Union. (RX 03)

Monde was suspended on March 24, 2000, for again falsifying his logs on March 19-20, 2000, as they related to commute times and tire checks on a trip from Indianapolis, to St. Louis, to Springfield, Missouri. (RX 04) Monde grieved this suspension, which was ultimately deadlocked and sent to the Joint Area Committee (hereinafter JAC). The grievance was held moot following Mr. Monde’s failure to timely grieve yet another discharge. (RX 04)

Monde was also suspended on March 24, 2000, for failing to make his running time on the March 19-20, 2000 trip. (RX 05)

This discipline was grieved and ultimately withdrawn by Respondent. (RX 05)

Monde was also suspended on March 24, 2000, for again falsifying his logs on March 21, 2000, relating to logging paid layover times at a foreign domicile. (RX 06) Monde grieved this discipline, but it was deadlocked to a higher grievance committee, and was later rendered moot by a subsequent discharge that wasn't grieved in a timely manner. (RX 06)

Each of the March 24, 2000 discipline letters were presented to Monde at the Indianapolis terminal on March 24, 2000, by Coordinator Rick Johnson. (Tr. 131) Monde refused to sign the letters, and Mr. Johnson did not explain the nature of the letters as they related to his job. (Tr. 135) Mr. Baysinger testified that it was company policy to not discuss letters with drivers if they refused to sign them until a grievance has been filed. (Tr. 672) Following the attempted service upon Monde personally, the letters were then mailed to his home. (Tr. 136) Monde didn't try to call Mr. Baysinger to discuss the discipline. Mr. Baysinger testified that he was available to discuss disciplinary matters with any driver, but that Monde did not take advantage of his open door policy. (Tr. 673) On April 5, 2000, Mr. Baysinger explained to the Union Business Agent, Jerry Lyons, the basis for the discipline. (Tr. 675) Mr. Lyons is employed by the Teamsters Union, Local 135, as a Business Agent representing drivers in grievance matters. Mr. Lyons testified that he explained the discipline to Monde over the telephone "when he got his first warning letter." (Tr. 591-592)

Monde was discharged on April 9, 2000, for log falsification on April 1, 2000, relating to tire inspections and logging commute times. (RX 07) This grievance was deadlocked to the JAC, and eventually held moot following a subsequent discharge. (RX 07)

Monde was discharged on April 10, 2000, for log falsification on April 9, 2000, relating to logging commute times. (RX 08) This grievance was deadlocked to the JAC, and eventually held moot following a subsequent discharge. (RX 08)

Monde was discharged on April 14, 2000, for log falsification on April 12-13, 2000, relating to tire inspections and logging work call times. (RX 09) This grievance was deadlocked to the JAC, and eventually held moot following a subsequent discharge. (RX 09)

Monde was discharged on April 18, 2000, for log falsification on April 15, 2000, relating to logging work call times. (RX 10) This grievance was deadlocked to the JAC, and eventually held moot following a subsequent discharge. (RX 10)

On April 24, 2000, Monde was deemed to have voluntarily quit[3] his job for missing three consecutive work days without notifying Roadway. (RX 11) Monde grieved the voluntary quit, and settled the grievance with the first six grievances at a grievance meeting. (RX 11, Tr. 567) He was reinstated to his position on agreement that he follow Roadway's instructions regarding the logging violations. (RX 11)

On July 18, 2000, Monde was discharged for log falsification on July 14-15, 2000, relating to tire inspections and, although logging layover times correctly, writing "under protest" on his logs. (RX 12) This discipline was grieved, deadlocked to the JAC, and ultimately found moot following another discharge.

On July 21, 2000, Monde received a warning letter for being unavailable for a work call on July 18, 2000. (RX 13) The warning letter was grieved, deadlocked to the JAC, and determined moot following a later discharge.

On July 26, 2000, Monde was discharged for log falsification on July 23, 2000, relating to tire inspections and, although logging layover times correctly, writing "under protest" on his logs. (RX 14) This discipline was grieved, deadlocked to the JAC, and ultimately found moot following another discharge.

On July 28, 2000, Monde was discharged for log falsification on July 26-27, 2000. (RX 15) Monde was also suspended on July 28, 2000, for exceeding the maximum running time from Kansas City, Kansas, to Indianapolis, Indiana on July 27, 2000. (RX 16) Ten days later, on August 13, 2000, he was removed from duty. (Tr. 182) Monde grieved the discharge on August 21, 2000, outside of the ten days permitted under the collective bargaining agreement. On May 16, 2001, following various appeals within the grievance process, the grievance was dismissed as untimely, and all pending grievances were held moot. (Tr. 760, RX 27)

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[3] Pursuant to Official Indiana Uniform Rules and Regulations section 6(a), a driver is deemed to have "voluntarily quit" if he is absent for three consecutive days without proper notification to Respondent.

Prior to his removal from duty, Monde had two suspensions for failing to meet his running times on routes. (RX 17, 18) Monde grieved both suspensions, but the grievances were ultimately held moot following his discharge. No action was taken by the Union on any of these matters following Monde's final dismissal.

Testimony

In addition to Complainant, Jerry L. Monde's testimony at the hearing, testimony was heard from: Gary Behling, Manager of Labor Relations for Roadway's Midwest Division; Ronald Baysinger, Relay Manager for Roadway's Indianapolis Terminal; Director of Corporate Safety, Dennis McMickens; Teamsters Union Local 135 Business Agent, Jerry Lyons; Roadway Relay Dispatcher, Gina Michelle Powell; Chief Union Steward, Larry Alden; Over-the-Road Driver and Safety Committee member, Kelly Wade; and Over-the-Road Driver and Safety Committee member, James Grizzel. I found all the witnesses credible except as indicated below.

Following the initial six disciplinary letters, Monde continued to log commute times, layovers, and tire inspections on non-placarded vehicles until the grievances were settled on May 23, 2000. (Tr. 570) Monde concedes that, as part of the settlement, he agreed to stop logging commute times and layovers, but disputes any agreement to stop logging tire inspections on non-placarded vehicles. (Tr. 162-163) Mr. Lyons and Mr. Baysinger were present at the settlement meeting and both testified that tire inspections were specifically addressed in the meeting. (Tr. 569, 749) I find the corroborating testimony of Mr. Lyons, business agent for the Union representing Monde, and Mr. Baysinger, credible, and the uncorroborated, conflicting testimony of Monde to be not credible as to the tire inspection agreement.

Regarding the issue of Mr. Monde's voluntary quit on April 24, 2000, Monde testified that he did not intend to voluntarily quit. (Tr. 154) He testified that he was out in his driveway, when he heard the telephone ring. (Tr. 154) By the time he got in the house to answer the phone, the phone stopped ringing. Using the call-back feature on his phone, he contacted a dispatcher at Roadway, Gina Powell. (Tr. 155, 475) Ms. Powell instructed Monde that he had called the wrong line, and that she would not give him a work call on that line. (Tr. 155, 475) Monde admits that he was told to call back on the driver's line, but did not because Ms. Powell had just informed him that she

was “not going to discuss a work call.” (Tr. 158) She then tried to call Monde, but got no answer. (Tr. 475) After not receiving a work call for a few days, he assumed that he had been laid off. (Tr. 159) Monde admitted that he had been told to call back on the driver’s line, and yet still asserts that he didn’t do so because he was told that a work call would not be discussed. (Tr. 158) Ms. Powell’s testimony was highly credible indicating that she was simply following company procedure used in all work call cases. Her testimony is verified by a contemporaneous e-mail to Scott Armour, and it was largely corroborated by Monde’s own testimony. I find Monde’s factual account of the incident fairly accurate, but find his testimony that he thought Ms. Powell would not discuss a work call with him at all, and that he subsequently assumed that he was laid off for a lack of work, but still made no calls to Roadway, not credible.

Following the settlement of the first six grievances and the voluntary quit, the disciplinary process was suspended for Monde for a period of time. Mr. Baysinger testified that he spoke with the union stewards regarding the continuing log violations during this period of leniency, and that he was ultimately forced to resume discipline of Monde. (Tr. 685) While Mr. Baysinger never spoke directly to Monde, Mr. Lyons testified that he had “many” conversations with Monde regarding logging problems, including tire inspections. Monde continued to assert at the trial that no one ever instructed him to not perform tire inspections on non-placarded loads. (Tr. 335) Based upon the consistent and credible testimony of Mr. Lyons and Mr. Baysinger, and the continued disciplinary process for logging violations, I find Monde’s testimony regarding his knowledge of the proper time and procedure for performing tire inspections to be not credible. Furthermore, Monde was being repeatedly disciplined over a period of nearly seven months for log violations, and yet never inquired of Mr. Baysinger as to why he was being disciplined. I interpret his conduct as demonstrating that he knew full well why he was being disciplined, but simply decided to not comply with the rules.

I find Monde’s testimony overall lacking in credibility relating to his previous failures to follow earlier agreements. He had settled a series of grievances with a personal agreement to follow company instructions and he later failed to do so. He was given a period of leniency to bring his actions in-line with company expectations, but those expectations were never reached. Monde was subjected to the same policies, procedures, and

disciplinary processes as any other driver in an effort to correct his behavioral deficiencies, but he failed to respond in an acceptable fashion.

Monde also supplied erroneous information on his application for employment with Roadway, by stating that he was currently employed, listing Covenant Transport as his then current employer, while he had in fact left Covenant Transport prior to applying to Roadway. (RX 33) When questioned about his erroneous application, he suggested that he misread the application regarding current employment but later admitted that he was untruthful when claiming that he was then employed. (Tr. 204)

Based upon each and all of these deficiencies and in evaluating his demeanor at trial, I find Monde's testimony not to have been credible.

Larry Alden testified that he attended a safety meeting in 2001 where he questioned the instructors, James Grizzel, Kelly Wade, and Kevin Wade, regarding the performance of tire checks on non-placarded loads. (Tr. 445-446) Mr. Alden testified that he was instructed to perform tire inspections on all hazardous material loads regardless of the amount of material or the requirement for placards. (Tr. 446-447) James Grizzel and Kelly Wade both testified that Alden was not told to perform tire inspections on every hazardous material load, but only on placarded loads as required by the regulations. (Tr. 500, 618) Mr. Grizzel's and Mr. Wade's corroborating testimony I find to be credible, while Mr. Alden's unsubstantiated and introductory testimony I find lacks credibility.

Further, Mr. Alden, who is a chief union steward, testified that based upon his casual observance of other tractor-trailers on the road, Roadway's equipment was in poor condition. (Tr. 391) Again, Mr. Grizzel and Mr. Wade, who are on safety committees and are driving and hazardous material trainers, testified to the maintenance program for Roadway's equipment, and found the equipment to be in good condition. (Tr. 489, 611) There is no evidence of pending complaints from the union regarding the condition of Roadway's equipment, nor evidence of DOT citations for poor equipment. To the contrary, Dennis McMickens, Director of Corporate Safety, testified that Roadway received the "Safest Fleet Award" from the American Truckers Association, and that the equipment is regularly maintained and passes DOT inspections. (Tr. 401, 403, 430) I find the

testimony of Mr. Grizzel, Mr. McMickens, and Mr. Wade to be consistent, corroborated, and therefore very credible. I find the testimony of Larry Alden to contain essential inconsistencies with other accepted testimony, and I therefore find his overall testimony to not have been credible.

CONCLUSIONS OF LAW

Monde complained that Respondent had disciplined and ultimately discharged him, in violation of Section 405(b) of the Act, for performing and logging tire checks on non-placarded vehicles, logging paid layover time as on-duty, and exceeding maximum allowed running times. 49 U.S.C. § 31105 provides in pertinent part:

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because–
>
> > (B) the employee refuses to operate a vehicle because–
> >
> > > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> >
> > > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

To establish a *prima facie* case of discriminatory treatment under the Act, the Complainant must prove: (1) that he was engaged in an activity protected under the Act; (2) that he was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of his employer. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). The establishment of the *prima facie* case creates an inference that the protected activity was the likely reason for the adverse action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). At a minimum, the Complainant must present evidence sufficient to raise an inference of causation. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992).

Once the *prima facie* case is established, the burden of production shifts to the Respondent to present evidence sufficient to rebut the inference of discrimination. To rebut this inference, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. *Carroll*, *supra*. A credibility assessment of the nondiscriminatory reason espoused by the employer is not appropriate; rather, the Respondent must simply present evidence of any legitimate reason for the adverse employment action taken against the Complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

If the employer successfully presents evidence of a nondiscriminatory reason for the adverse employment action, the Complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. *Moon*, *supra*; *See also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the adverse employment action. The employee must prove both that the asserted reason is false and that discrimination was the true reason for the adverse action. *Hicks*, *supra*, at 2752-56.

Protected Activity

Under Section 405(b) of the Act, protected activity may consist of a driver’s refusal to operate a vehicle when the operation violates the law, or because the employee has a reasonable apprehension of serious injury due to an unsafe condition. 49 U.S.C. § 31105(b). However, the Act offers protection only if a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury or serious impairment of health resulting from the unsafe condition. *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76 (2nd Cir. 1994). Monde asserts that he engaged in protected activity when he performed and logged tire checks on non-placarded vehicles, logged paid layover time as on-duty, and exceeded maximum allowed running times.

Tire Inspections

Monde performed tire checks every two hours or one hundred miles on trucks containing hazardous materials in quantities of

insufficient type and/or amount to require placarding under the DOT regulations. Monde asserts that he performed these inspections in compliance with 49 C.F.R. § 397.17, and to satisfy his apprehension regarding the transport of hazardous materials and the safety of himself and the motoring public. (Tr. 63)

49 C.F.R. § 397.17(a) provides:

> If a motor vehicle which contains hazardous materials is equipped with dual tires on any axle, its driver must stop the vehicle in a safe location at least once during each 2 hours or 100 miles of travel, whichever is less, and must examine its tires.

Roadway issued a handbook entitled Explanation of Federal Motor Carrier Safety Requirements, which required tire checks on vehicles containing "any amount of hazardous material." (CX 02) Monde asserts that he interpreted this provision to apply to all hazardous material regardless of a requirement for placarding. Monde testified that he read the DOT's safety regulations and that he read "cover to cover" the handbook, published by Roadway, explaining these regulations. (Tr. 208, 258) He also testified that he understood that §397.17(a) dealt with placarded loads. (Tr. 258)

The subsections of 49 C.F.R. Part 397 clearly deal with hazardous material of sufficient quantity and type to require DOT placards, as indicated in §397.1. I find that driving a commercial motor vehicle (hereinafter CMV) containing hazardous materials not requiring placards does not require periodic tire checks. Therefore, operating such a vehicle without performing tire checks would not violate a "regulation, standard, or order of the United States related to commercial motor vehicle safety or health," pursuant to section 405(b)(i). Accordingly, Monde's refusal to so operate a vehicle does not constitute protected activity.

Section 405(b)(ii) provides protection to Monde if his refusal to operate a CMV containing non-placarded loads of hazardous materials is based upon a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. Monde asserts that his apprehension of operating a CMV containing hazardous materials is reasonable since he has experienced tire problems in the past and combination trailers are prone to a "crack the whip" effect with

tire problems. He also testified that he was relatively inexperienced driving double trailers with hazardous materials on board and that he also has concern since he was not permitted to inspect the loading of the sealed trailers.

Larry Alden, James Grizzel, and Kelly Wade testified to tire failures during their careers. (Tr. 392, 503, 625) While tire failures may be inevitable in the trucking industry, neither DOT nor Roadway have policies requiring tire inspections on all CMV's. The absence of a tire check policy on all CMV's facially indicates that Monde's apprehension was unreasonable. The DOT is charged with protecting the motoring public by promulgating rules and regulations regarding the use of this nation's roadways. Ronald Baysinger testified that the safety of Roadway's drivers and the motoring public are a large concern for Roadway. He also said that the trucking industry's profit margins are so slim that if a driver has a $100,000 wreck, Roadway would need to have $10 million worth of business to pay for the accident. Thus safety is a financial necessity. Further, Jerry Lyons testified that none of the nine hundred drivers that he represents, regardless of their experience, perform tire checks on non-placarded loads. (Tr. 567, 590) Finally, Mr. Alden, Mr. Grizzel, and Mr. Wade testified that they performed tire inspections on non-placarded loads during breaks, when they noticed a problem, or if they ran over something in the road. I find tire inspections on non-placarded loads reasonable when prompted by suspicion of a problem or when exiting the truck for breaks. I find that Monde's apprehension regarding tire failures is not reasonable, and his tire inspections on non-placarded vehicles do not, therefore, constitute protected activity pursuant to section 405(b)(ii).

Monde also asserts his apprehension regarding the handling of hazardous materials by Respondent, and his inability to inspect his trailers before driving. Mr. Baysinger described the exhaustive procedures taken by Roadway to ensure the safety of hazardous materials. He described the procedure for picking up hazardous materials by trained city drivers, the loading by trained dock workers, and the trailer inspections by supervisors for each hazardous shipment loaded on a trailer. (Tr. 651-653) Additionally, the hazardous material bills, manifests and stack sheets are verified by various supervisors for accuracy, and presented to the driver for review. (Tr. 653-658) The system, however, may not be perfect, as Mr. Baysinger testified that he had disciplined both dock workers and city drivers for improper handling of hazardous materials. (Tr. 707) For Monde's

apprehension to be reasonable, however, it must be such that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury or serious impairment of health resulting from the unsafe condition. Monde never took advantage of Mr. Baysinger's open door policy to inquire about the safety of hazardous materials at Roadway, nor did Monde assert that his hazardous materials and truck loading expertise was beyond that of those assigned to load and inspect the trucks. Between the DOT regulations for hazardous materials, and the Roadway policies for handling hazardous materials, I find that Monde's apprehension was not reasonable, therefore, his tire checks do not constitute protected activity pursuant to 405(b)(ii).

Monde's apprehensions regarding tire conditions, hazardous materials handling, and safety were not such that a reasonable person, under the circumstances then confronting him, would conclude that there is a bona fide danger. Accordingly, the tire checks do not constitute protected activity as defined in Section 405(b)(ii).

Monde's final assertion with respect to the tire inspections as protected activity is that if he was not satisfied with the safety of his vehicle, he would be in violation of §§ 392.7 and 396.13, and thereby in violation of Section 405(b)(i). Sections 392.7 and 396.13 apply directly to equipment inspections and require a driver to be personally satisfied with the safety of his equipment.

Section 405(b)(ii) requires that an employee's apprehension regarding the safety of his equipment be reasonable. Interpreting section 405(b)(i) to protect all refusals to operate vehicles without the driver being personally satisfied, pursuant to sections 392.7 and 396.13, regardless of the reasonableness of their personal satisfaction, would serve to render section 405(b)(ii) ineffective. In construing a statute I am obliged to give effect, if possible, to every word Congress used. ***Watt v. Alaska***, 451 U.S. 259, 267, 101 S.Ct. 1673, 1678(1981); cf. ***Reiter v. Sonotone Corp.***, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331(1979); ***Halverson v. Slater***, 129 F.3d 180(D.C. Cir 1997). Congress cannot be presumed to do a futile thing. See ***Ramah Navajo Sch. Bd., Inc. v. Babbitt***, 87 F.3d 1338, 1344-45(D.C. Cir. 1996). In this case, interpreting the regulations to provide protection to Monde's activities

regardless of their reasonableness would serve to render section 405(b)(ii) futile.

Furthermore, whistleblower provisions are intended to promote a working environment in which employees are free from the debilitating threat of employment reprisals for asserting company violations of statutes protecting safety. They are not, however, intended to be used by employees to shield themselves from termination actions for non-discriminatory reasons. *See Makam v. Public Service Electric and Gas Co.,* ARB No. 99-045, ALJ No. 1998-ERA-22 (ARB Jan. 30, 2001) citing, *Trimmer v. U.S. Dept. of Labor*, 174 F.3d 1098 (10th Cir. 1999). Certainly Congress did not intend "to tie the hands of employers in the objective selection and control of personnel" in enacting various laws proscribing employment discrimination. *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 279 (7th Cir. 1995). To interpret sections 392.7 and 396.13 as providing protection for every driver's refusal to drive when premised upon even the most unreasonable of safety concerns, serves to tie an employer's hands with respect to personnel control. Monde's apprehensions regarding the safety of his equipment were outside the bounds of reason. I find that an unreasonable apprehension is not converted to protected activity by sections 392.7 and 396.13.

Paid Layover Time

Monde asserts that refusing to drive a CMV without logging paid layover time at a foreign domicile constitutes protected activity for which he was disciplined. Section 395.2 defines "on-duty time" as "all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work." The regulation provides activities included in this definition, including driving time, inspections, loading and unloading, and all time waiting to be dispatched. Monde contends that time spent at a hotel in a foreign domicile, after he has obtained eight hours of rest, waiting for a work call is "on-duty" time.

The Federal Motor Carrier Safety Administration provides guidance to this provision. The Regulatory Guidance for Part 395 provides that "if the employer generally requires its drivers to be available for call after a mandatory rest period which complies with the regulatory requirement, the time spent standing by for a work-related call, following the required off-

duty period, *may* be properly recorded as off-duty time." (RX 26, emphasis added) Policies were in place at Roadway to contact off-duty drivers by telephone and to have them respond to work-calls. I find that Monde was not confined to his hotel room while awaiting a call. Pursuant to the regulations, this time may properly be recorded as off-duty time, therefore, it would not violate section 395.8 to record it as such. Since recording this time as off-duty would not violate a regulation, standard, or order of the United States relating to commercial motor vehicle safety or health, the refusal to drive a CMV was not protected under section 405(b)(i).

Running Times

Mr. Monde's final assertion of protected activity is his failure to meet contractually defined run times for various trips due to the length of his pre-trips and tire checks en route. It is important to note that at no time did Monde file a grievance regarding allotted running times established through the collective bargaining position of the Union and the Respondent, nor did he grieve the times allotted for pre-trips and breaks, which was his right to do under the collective bargaining agreement. Further, Jerry Lyons testified that Respondent's established running times are more lenient than those of competitors. (Tr. 575) Finally, Monde testified that had he eliminated tire checks on March 19-20, 2000, but not pre-trips, he could possibly have made his run time. (Tr. 123)

Monde first contends that a fifteen to thirty minute pre-trip inspection was necessary to satisfy himself as to the safety of his equipment, and that those pre-trips caused him to miss his running times. Pre-trip inspections are mandated by Respondent and the DOT. Mr. Baysinger testified that he had no problem with a fifteen minute pre-trip, and that the occasional thirty minute pre-trip on an older vehicle was also not unreasonable, and would not prevent a driver from making a run time. I find that Monde's pre-trip inspections were not unreasonable in their duration and therefore constitute protected activity pursuant to section 405(b)(ii). As discussed above, I find his tire inspections on non-placarded loads were not reasonable, regardless of the effect they had on his running times.

Adverse Employment Actions

Any employment action by an employer which is unfavorable to the employee's compensation, terms, conditions, or privileges of employment constitutes an adverse action. *Long v. Roadway Express, Inc.*, 88-STA-31 (Sec'y Mar. 9. 1990). In this case, between March and August 2000, Monde received four warnings, five suspensions, and was discharged seven times. It is clear that Monde was subject to adverse employment action.

Causal Connection

Monde must demonstrate that a "causal link" exists between his protected activity and Respondent's adverse action. *Yellow Freight System, Inc. v. Reich,* No. 93- 3488 (6th Cir. 1994). Direct evidence is not required for a showing of causation. *Clay v. Castle Coal & Oil Co., Inc.,* 90-STA-37 (Sec'y Nov. 12, 1991). In this case, it is demonstrated by direct evidence that Monde was disciplined for performing tire checks, logging commutes, and logging paid layover times. As discussed above, these activities are not protected as the adverse actions relate to log falsifications for tire inspections and logging layovers at foreign domiciles, and they are not causally linked to protected activities. Four of the disciplinary actions, one warning and three suspensions, were related to delays of freight which Monde asserts were caused, at least in part, by the length of his pre-trip inspections, determined above to be a protected activity.

On March 24, 2000, Monde was disciplined with a warning letter for exceeding the running times on his March 18, 2000 run by almost ninety minutes. On March 18, 2000, Monde spent fifteen minutes on a pre-trip inspection and forty-five minutes on tire inspections. On July 28, 2000, Monde was suspended for exceeding the running time on his July 27, 2000 run by one hour and forty eight minutes, averaging approximately fifty miles per hour. (Tr. 762-764, RX 16) On July 27, 2000, he spent thirty-minutes on a pre-trip inspection and one hour and fifteen minutes on tire inspections. On August 2, 2000, he was suspended for exceeding the running times on his July 29-30, 2000 run by approximately one and one-half hours, averaging fifty miles per hour or less. (Tr. 766-770, RX 17) On July 29-30, 2000, he spent thirty minutes on a pre-trip inspection and one hour and fifteen minutes on tire inspections. On August 8, 2000, he was suspended for exceeding the running times on his

August 5-6, 2000 run by approximately two and one-half hours. (Tr. 770, RX 18) On August 5-6, 2000, he spent thirty minutes on a pre-trip inspection and one hour and fifteen minutes on tire inspections.

As noted above, Mr. Baysinger testified that he had no problem with a fifteen minute pre-trip, and that the occasional thirty minute pre-trip on an older vehicle was also not unreasonable, and would not prevent a driver from making a run time. Further, although several of the drivers testified that they performed pre-trip inspections in five or six minutes, Larry Alden testified that his pre-trips took anywhere from three minutes to thirty minutes or more. (Tr. 395) There is no evidence, direct or otherwise, of other drivers being disciplined for exceeding the allotted time for pre-trip inspections. Most convincing, however, is the fact that, even without considering the pre-trip inspections, Monde still exceeds the collectively bargained for run times by over an hour. When questioned about the July 27, 2000 discipline for exceeding run times, he testified that the older equipment or the weight of the trailers "might" have been the cause. (Tr. 177) He also asserted that he encountered fog on this trip, but didn't log weather problems, he simply logged a break. (Tr. 178) He never grieved the run times, or the allotment for pre-trip inspections, raising them as an issue only after he had been discharged and his grievance was dismissed. Further, he never interjected into his grievances that the equipment prevented him from meeting run times. I find that the discipline administered to Monde with respect to the four instances of exceeding run times are not causally connected to the thoroughness or length of his pre-trip inspections.

Roadway's expressed reasons for disciplining and ultimately discharging Monde are not related to any activity protected under the Act. Therefore, Monde is not entitled to reinstatement, money damages, attorney fees and costs.

Conclusion

In conclusion, I find that Monde is attempting here to use the Surface Transportation Assistance Act to gain reinstatement and damages following his failure to timely grieve his last discharge. Monde was given multiple opportunities, even above and beyond those prescribed by the collective bargaining agreements, to comply with Respondent's reasonable request for

correctly logging his time. Even after agreeing to comply, he continued to incorrectly perform his job, for which he was ultimately discharged. Monde was not disciplined, discriminated against, or discharged for doing any activities protected by the Act.

RECOMMENDED ORDER

I recommend that Jerry L. Monde's claim for reinstatement, money damages, and attorney fees be DENIED.

A
Rudolf L. Jansen
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, D.C. 20210. See 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978(1996).